BUD BURNAUGH, APPELLANT

IBLA 72-62 Decided January 10, 1973

Appeal from decision (Wyoming 2-70-2) by Administrative Law Judge Robert W. Mesch affirming the rejection of an application for grazing privileges.

Affirmed

Grazing Permits and Licenses: Base Property (Land): Dependency by Use--Grazing Permits and Licenses: Cancellation and Reductions

Base property qualifications in whole or in part, will be lost upon the failure for any two consecutive years to include in any application for a license or permit or renewal thereof the entire base property qualifications for active, nonuse, or combination of active and nonuse.

APPEARANCES: Bud Burnaugh, pro se, appellant; Thomas C. Bogus, Field Solicitor, Department of the Interior, Cheyenne, Wyoming, for appellee.

OPINION BY MR. RITVO

Bud Burnaugh has appealed from a decision dated August 2, 1971, of an Administrative Law Judge 1/ affirming the Lander, Wyoming, District Manager's rejection of an application filed by appellant for grazing privileges covering 23 cattle from May 16 to October 15.

As a basis for his application appellant offered property he had purchased at a public foreclosure sale. The District Manager found that the property had lost its former base property qualification for grazing privileges by reason of 43 CFR 4115.2-1(e)(9) which provides that base property qualifications, in whole part or in part will be lost upon the failure for two consecutive years to include in an application

1/ The title "Administrative Law Judge" replaced that of "Hearing Examiner" pursuant to an order of the Civil Service Commission. 37 F.R. 16787 (August 19, 1972).

for a license or permit or renewal thereof the entire base property qualifications for active, nonuse, or combination of active and nonuse.

After a careful review of the record, we agree with and adopt the Judge's decision, a copy of which is attached. 2/ Jack G. Taylor, A-31014 (June 25, 1969); Anawalt Ranch and Cattle Co., et al., 70 I.D. 6 (1963).

The dissenting opinion stresses the fact that the base property remained in receivership for five years. However as the decision below pointed out the pertinent regulation covers this situation. It provides that the acquisition of rights in base property by an unqualified applicant by operation of law will not adversely affect the renewal of a license or permit based on such property for a period of two years. If the "unqualified applicant" does not qualify within two years, the license or permit will be subject to cancellation in accordance with 43 CFR 4115.2-1(d). 43 CFR 4111.1-2.

The receiver of the Gustin base property had the advantage of this regulation for two years. Within that time he should have taken steps to protect the base property qualifications. Indeed it would seem to have been one of his duties to do so. Not having done so, the qualifications were lost. Since the rights were lost at the end of two years, it is of no importance that the receivership lasted five. The receiver having failed to utilize the period allowed him, it is not material that, even if he had done so, he would have had to take other steps to protect the base property qualifications for An additional period of time, as he could have done by leasing the base property to a qualified applicant. We also note that another provision of the regulations provides that nonuse maybe granted for "financial or other reasons beyond the control of the licensee or permittee". 43 CFR 4115.2-1(e)(11). The receiver apparently made no attempt to seek relief under this provision.

Rather than concluding that the regulations do not cover the situation presented here, we believe they specifically contemplate it and provide ample time and means for protection of the base property qualifications.

2/ The Judge stated that a mortgage on the base property was foreclosed by the Farmers Home Administration. Appellant says that the mortgage was sold to Richard L. Goodman, who instituted the foreclosure proceedings. This factual correction is accepted. It does not make any change in the validity of the Judge's decision.

The testimony the dissent cites from the transcript does not mean that base property qualifications could not have been utilized. It merely agrees that the final disposition of rights in the Gustin ranch had to await the termination of the receivership, quite a different thing.

We note that the dissent states that it would toll the regulation for the period of the receivership. It, however, offers no authority for disregarding the plain language of the regulation.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1 the decision appealed from is affirmed.

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Martin Ritvo, Member

I concur:

_____
Joseph W. Goss, Member

I dissent:

_____
Frederick Fishman, Member

August 2, 1971

DECISION

BUD BURNAUGH,	:	WYOMING 2-70-2
	:	
Appellant	:	Appeal from Decision issued
	:	May 5, 1970, by the District
	:	Manager, Lander Grazing District.

This appeal questions the actions of the District Manager, Lander, Wyoming Grazing District, Bureau of Land Management, in rejecting an application filed by the appellant for grazing privileges covering 23 cattle from May 16, to October 15. The District Manager rejected the application because of 43 CFR 4115.2-1(e)(9), which provides, in part:

> Base property qualifications, in whole or in part, will be lost upon the failure for any two consecutive years:
>
> (i) To include in an application for a license or permit or renewal thereof, the entire base property qualifications for active, nonuse, or combination of active and nonuse . . .

A hearing was held on April 19, 1971, at Lander, Wyoming. There is no controversy between the appellant and the Bureau concerning the relevant facts. They are as follows.

In 1965, Edward Gustin, the owner of the base property, attempted to transfer the grazing privileges attached to the base property to Jeff Hancock. The transfer was not consummated because the Farmers Home Administration, which held a mortgage on the base property, refused to consent to the transfer. See 43 CFR 4115.2-2(b)(3). In 1966, Gustin

applied for and received a license for total nonuse. The license was issued to Gustin as the owner of the base property. At that time Hancock was given a temporary license under 43 CFR 4115.2-1(i) because of the nonuse taken by Gustin, and because of pending litigation between Hancock and Gustin concerning the transfer of the grazing privileges. Between 1967 and 1970, the base property was not included in any application for grazing privileges. During this period of time, Hancock continued to receive temporary licenses because no one else was using the privileges attached to the base property. The temporary licenses issued to Hancock had no direct relationship to the base property.

Sometime around 1965, the Farmers Home Administration instituted a mortgage foreclosure proceeding involving the base property. The property was under the control and supervision of a court appointed receiver for Some five years. The lands were finally sold under the power of sale contained in the mortgage, and the appellant subsequently acquired the rights of the purchaser at that sale. In April of 1970, the appellant applied for grazing privileges based on the former Gustin base property.

The appellant contends that the base property qualifications were not lost under 43 CFR 4115.2-1(e)(9) because (1) the title to the property was clouded to such an extent that no one could properly offer it in an application for grazing privileges, (2) the court appointed receiver was not authorized to conduct a livestock operation and therefore was not a qualified applicant for grazing privileges under 43 CFR 4111.1-1, and (3) the issuance of the temporary licenses to Hancock maintained the grazing privileges in good standing.

There is not, in my opinion, any merit to the appellant's contentions. I cannot conceive of any reason why the receiver could not have obtained court approval to offer the base property in support of an application for nonuse under 43 CFR 4111.1-2. Under this provision the receiver could have offered the base property and obtained licenses for a two-year period even though he was an unqualified applicant. The temporary licenses issued to Hancock under 43 CFR 4115.2-1(i) were not based upon the base property and Hancock's applications could not have included the base property qualifications. The temporary licenses had absolutely no effect on the grazing privileges attached to the Gustin base property.

In view of the mandatory wording of 43 CFR 4115.2-1(e)(9), I do not believe that the District Manager had any alternative other than to treat the base property qualifications as having been lost. The action of the District Manager in rejecting the appellant's application was entirely proper.

The appeal is dismissed.

Robert W. Mesch
Hearing Examiner

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DISSENT OF FREDERICK FISHMAN

I cannot agree that the base property qualifications were lost because of the failure to offer them for two consecutive years. 43 CFR 4115.2-1(e)(9).

The Judge's decision sets forth the pertinent facts as follows:

> In 1965, Edward Gustin, the owner of the base property, attempted to transfer the grazing privileges attached to the base property to Jeff Hancock. The transfer was not consummated because the Farmers Home Administration, which held a mortgage on the base property, refused to consent to the transfer. See 43 CFR 4115.2-2(b)(3). In 1966, Gustin applied for and received a license for total nonuse. The license was issued to Gustin as the owner of the base property. At that time Hancock was given a temporary license under 43 CFR 4115.2-1(i) because of the nonuse taken by Gustin, and because of pending litigation between Hancock and Gustin concerning the transfer of the grazing privileges. Between 1967 and 1970, the base property was not included in any application for grazing privileges. During this period of time, Hancock continued to receive temporary licenses because no one else was using the privileges attached to the base property. The temporary licenses issued to Hancock had no direct relationship to the base property.
>
> Sometime around 1965, the Farmers Home Administration instituted a mortgage foreclosure proceeding involving the base property. The property was under the control and supervision of a court appointed receiver for some five years. The lands were finally sold under the power of sale contained in the mortgage, and the appellant subsequently acquired the rights of the purchaser at that sale. In April of 1970, the appellant applied for grazing privileges based on the former Gustin base property.

The Judge, in evaluating the arguments offered on appeal, stated:

> I cannot conceive of any reason why the receiver could not have obtained court approval to offer the base property in support of an application for nonuse under 43 CFR 4111.1-2. Under this provision the receiver could have offered the base property and obtained licenses for a two-year period even though he was an unqualified applicant.

The Judge properly concluded that the receiver was not a qualified applicant. 1/ But the invocation of 43 CFR 4111.1-2 2/ seems inappropriate. The only method for the receiver "to qualify within the two-year period" under that regulation would be for him to get into the livestock business, hardly a rational requirement.

The purpose of 43 CFR 4115.2-1(e)(9) is to prevent base property qualifications, not utilized for two years, from becoming a potential charge against grazing privileges and disturbing settled adjudications where their nonutilization stems from a voluntary non-offering of the base property qualifications. Implicitly 43 CFR 4111.1-2 recognizes this concept, but fails to cover the present problem.

It is clear to me that the considerations underlying the cited regulations are not pertinent here and cessante ratione legis, cessat et ipsa lex, a different result should follow. See State of Alaska, Andrew J. Kalerak, 73 I.D. 1, 10 (1966), aff'd 396 F.2d 746 (9th Cir. 1968), cert. denied, 393 U.S. 1118 (1969).

1/ 43 CFR 4111.1-1 provides as follows:

An applicant for a grazing license or permit is qualified if:

(a) He is engaged in the livestock business and is a citizen of the United States or has on file before a court of competent jurisdiction a valid declaration of intention to become a citizen or a valid petition for naturalization, or:

(b) It is a group, or association authorized to conduct business under the laws of the State in which the grazing privileges sought are to be exercised, all the members of which are qualified under paragraph (a) of this section; provided that the agreement or articles of association under which the association has been formed are approved by the State Director, or:

(c) It is a corporation, the controlling interest in which is vested in persons qualified under paragraph (a) of this section and which is authorized to do business under the laws of the State in which grazing privileges sought are to be exercised; provided that the articles of incorporation have been approved by the State Director.

2/ This section reads as follows:

§ 4111.1-2 Effect of transfer arising through operation of law.

The acquisition of rights in base property by an unqualified person through operation of law or testamentary disposition will not adversely affect any outstanding license or permit, or preclude the issuance or renewal of a license or permit, based on such property, for a period of two years after such acquisition. Upon the failure of such person to qualify within the two year period the license or permit will be subject to cancellation in accordance with § 4115.2-1(d).

An argument is offered by the main opinion in favor of the Judge's decision that the receiver could have utilized 43 CFR 4111.1-2 to obtain nonuse licenses for two years. However, that course of action would still have left a hiatus of three years. It also could be argued that the receiver could have assigned to persons, who were in the livestock business, the base property.

These arguments fall short, in my judgment, of overcoming the fact that the Bureau's range specialist did not apparently perceive any of these courses of action. This is manifested by the following colloquy between the appellant and range specialist respectively:

> Q. And this permit was part of the base property assets, there is no way that it could be cleared up in any way until the courts decided so by the court order, and that was 1970, and then the permit was filed by myself, Bud Bernaugh [sic]; is that correct:
>
> A. Yes.

It seems to be unduly harsh and unrealistic to charge an appellant, and his predecessor in interest, with knowledge absent from a Bureau expert in range management.

The main opinion argues that the receiver could have invoked 43 CFR 4115.2-1(e)(11) to obtain a nonuse permit. That section reads as follows:

> (11) Nonuse, in whole or in part, of grazing privileges under a license or permit may be authorized by the District Manager, upon application by the licensee or permittee, after reference to the advisory board, for the following reasons: conservation, and protection of the Federal range, annual fluctuations in livestock operations, or financial or other reasons beyond the control of the licensee or permittee. [Emphasis supplied]

Since the receiver was not a qualified applicant, 43 CFR 4111.1-1, he could not be the "licensee or permittee" and therefore could not have obtained a nonuse permit. It necessarily follows that 43 CFR 4115.2-1(e)(11) would have been of no avail to the receiver.

Although the regulations do not specifically provide relief in the case at bar, the general supervisory authority of the Secretary may be invoked by this Board.

The Secretary's powers are those expressly granted and those necessarily implied from granted powers. Pan American Petroleum Corp. v. Pierson, 284 F.2d 649, 655 (10th Cir. 1960). There is a wide latitude available to him in many situations. Seaton v. Texas Co., 256 F.2d 718, 722 (D.C. Cir. 1958). The inherent power of the Secretary to do justice, in circumstances similar to those herein, is broader than the equitable adjudication authority delegated under 43 CFR § 1871.1 (1971). The United States Supreme Court in Knight v. United States Land Association, et al., 142 U.S. 161 (1891) explained:

> The general words of those sections [setting forth Secretarial powers and duties] are not supposed to particularize every minute duty devolving upon the Secretary, and every special power bestowed upon him. There must be some latitude for construction. In the language of this court in the late case of Williams v. United States, 138 U.S. 514, 524 [1891]: "It is obvious, it is common knowledge, that in the administration of such large and varied interests as are intrusted to the Land Department, matters not foreseen, equities not anticipated, and which are, therefore, not provided for by express statute, may sometimes arise, and, therefore, that the Secretary of the Interior is given that superintending and supervising power which will enable him, in the face of these unexpected contingencies, to do justice."
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> 142 U.S. at 181

See also Boesche v. Udall, 373 U.S. 472, 477 (1962) for the proposition that the Secretary of the Interior is vested "with general managerial powers over the public lands."

I note that Gustin, with apparently no base property qualifications therefor, was awarded grazing privileges, while appellant, who has the base property, was denied grazing privileges, a highly anomalous result.

I would hold that the period set by the regulations, 43 CFR 4115.2-1(e)(9) is tolled during the period of the receivership and would grant appellant the requested privileges.

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Frederick Fishman